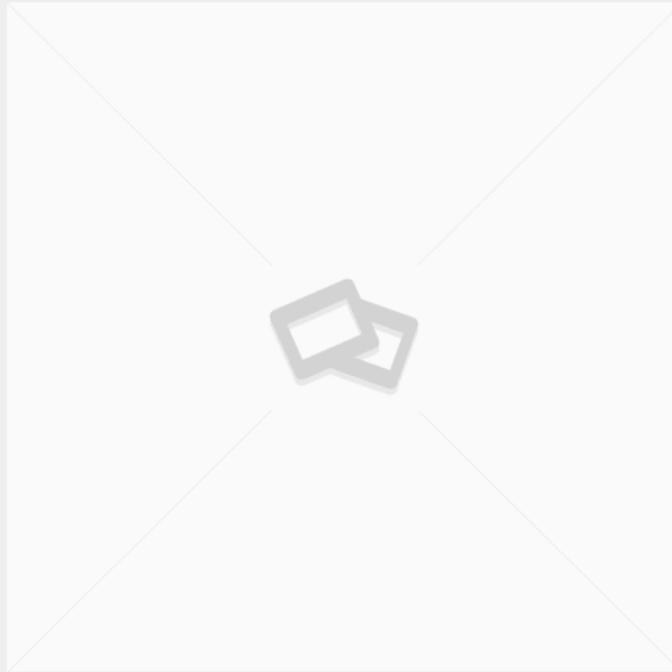


HOW INTERNATIONAL INVESTMENT DISPUTE SETTLEMENT WORKS

Posted on March 20, 2017 by Suzanne Zhou



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Jump to: 2 20 default wide Key points:

- A common form of dispute settlement in investment treaties is investor-state arbitration, which allows for investors to bring proceedings against states
- In an investor-state arbitration, each party appoints one arbitrator, with the third to be chosen by agreement
- It is possible to challenge the jurisdiction of an arbitral tribunal on a number of grounds
- Historically, arbitral proceedings have been confidential, although there has recently been a move toward more transparent proceedings

- Some arbitral rules provide a limited right for third parties (such as intergovernmental organizations, other states, non-governmental organizations, and/or academic experts) to participate
- The primary remedy is monetary compensation
- There are limited opportunities for review of investment awards
- A host state that successfully defends a claim can attempt to recover costs from an investor

40 default wide line Introduction

Investment disputes can sometimes be resolved in local courts, or through state-state dispute settlement. However, the most common way in which breaches of an investment treaty are enforced is via investor-state arbitration.

Investor-state arbitration is a form of dispute settlement where a dispute between an investor and a host state is heard by an ad hoc tribunal of arbitrators. It is a hybrid of similar procedures developed in the context of commercial and state-to-state disputes. Essentially, under an investment treaty which provides for investor-state arbitration, the parties to the treaty have each agreed that they will resolve disputes with the other parties' investors through an ad hoc panel of party-appointed arbitrators, who will issue a binding judgment based on law.

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20 default 2. Who can initiate disputes line Item 1

Typically, investment treaties provide for foreign investors to initiate disputes against a host state, in relation to certain investments. A host state may be able to make counterclaims against an investor if the counterclaim is closely related to the investor's claims[tooltip hint="See, e.g., ICSID Convention art 46, UNCITRAL Rules 21.3"][*][/tooltip]. Recent cases have also recognised some ability of states to make claims against investors, depending on the wording of the dispute settlement clause and the availability of a relevant claim[tooltip hint="See, e.g. Urbaser S.A. v Argentine Republic, para 1143"][*][/tooltip]. However, the general rule is that only the investor can initiate the dispute.

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20 default 3. What procedural rules apply line Item 2

There is no centralised set of procedural rules in investor-state arbitration – instead, parties choose the procedural rules that will apply to the dispute, either via the treaty or individually for each dispute. Sometimes the rules that will apply to an arbitral dispute are specified in the treaty. Other treaties provide that the parties can choose the rules for each dispute.

Two common sets of rules are International Centre on the Settlement of Investment Disputes'

(ICSID) [Convention](#) and its [Arbitration Rules](#), and the rules of the UN Commission on International Trade Law ([UNCITRAL Rules](#)). There are other rules that are less commonly used in an investor-state context, but the remainder of this page will refer primarily to the ICSID Convention/Rules and UNCITRAL Rules.

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20 default 4. Appointment of arbitrators line Item 2

A defining feature of arbitration is that parties choose their arbitrators. Typically, parties choose three arbitrators, with one arbitrator appointed by the claimant, one by the respondent state, and the third arbitrator appointed either by agreement of the two other arbitrators, or by an arbitral institution. This third arbitrator usually serves as president of the tribunal.

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20 default 5. Challenging the jurisdiction of the Tribunal line Item 2

An arbitral tribunal must consider both whether it has jurisdiction (i.e. the ability to hear the case), and, in the event that it does, the claims on their merits. It is therefore possible for a state to challenge the jurisdiction of the tribunal as well as defend the claims on their substance. This can be done on a number of bases, including by arguing that the investor is not a foreign investor of the nationality of the home state, that the dispute is not about an investment, that the investment was unlawfully admitted, that procedural requirements have not been fulfilled, or that there is an abuse of right. Challenges to jurisdiction can be heard together with the merits, or separately (in what are known as 'bifurcated' proceedings)

In [Philip Morris Asia v. Australia](#), for example, the Tribunal found that it [did not have jurisdiction](#) over a dispute against Australia's plain packaging laws (which require all tobacco products to be sold in standardized drab dark brown packaging without images, colours, scents, fonts or other branding, other than a brand and variant name, manufacturer information, consumer disclosures in a standard size and font, and graphic health warnings covering 75% of the front and 90% of the back of packs), brought under the [1993 Australia - Hong Kong BIT](#). Philip Morris had transferred its Australian business to its Hong Kong subsidiary before plain packaging had been enacted by Parliament, but more than ten months after plain packaging had been announced by the Government. The tribunal found that initiating a claim under the BIT after making this restructure was an abuse of rights, because the dispute over plain packaging was by that stage clearly foreseeable, and the restructure was made for the main, if not sole, purpose of bringing a claim against Australia. The tribunal therefore did not consider the merits of the claim.

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20 default 6. Confidentiality and transparency line

Investor-state arbitration has traditionally been confidential unless the parties decide otherwise, in line with norms developed in international commercial arbitration. However, the major arbitral rules are increasingly providing for greater transparency in investor-state arbitration.

ICSID proceedings are not confidential unless the parties agree or the tribunal makes an order to that effect [tooltip hint="ICSID Rules 32, 48.4"][*][/tooltip]. Under the UNCITRAL Rules, the default rule prior to 2014 was that the proceedings and all related documents were confidential [tooltip hint="UNCITRAL Rules 28.3"][*][/tooltip]. However, in 2014, UNCITRAL adopted its [UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration \(Transparency Rules\)](#) and the [United Nations Convention on Transparency in Treaty-based Investor-State Arbitration \(also known as the Mauritius Convention\)](#), which, where they apply, make public hearings and the publication of documents the default rule.

Parties can seek greater transparency even if rules on transparency do not apply, either through agreement with each other or through contesting it before the Tribunal if the parties cannot agree. For example, in *Philip Morris v. Australia*, an UNCITRAL arbitration that was not subject to the Transparency Rules or the Mauritius Convention, the Tribunal [ruled that](#), because of the public interest in the case, the Award would be published and each party would be free to publish its own submissions, although the hearings would be held in private and there would be a process for redacting commercial confidential information from the award and submissions.

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20 default 7. Third party participation and amicus curiae briefs line

Depending on the arbitral rules which apply, there may be scope for third parties (such as intergovernmental organizations, other states, non-governmental organizations, and/or academic experts) to participate in proceedings. Under ICSID rules, third parties may apply to make submissions as a 'non-disputing party.' [tooltip hint="ICSID Rule 37"][*][/tooltip] Under UNCITRAL, third parties can participate if the [Transparency Rules](#) or the [Mauritius Convention](#) apply. There is otherwise no provision for third parties to participate in UNCITRAL proceedings.

Third party (or 'amicus curiae') submissions can be important. For example, the WHO/WHO FCTC Secretariat and PAHO each provided amicus curiae briefs in [Philip Morris v. Uruguay](#). The Tribunal took them into account in determining whether Uruguay's single presentation requirement was evidence-based, and largely accepted the amicus curiae conclusions on the matter.

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20 default 8. Remedies line

Monetary compensation is by far the most common form of reparation in investor-state arbitration.

In many treaties, monetary damages and return of property taken by the state are the only remedies available to investors.

Investment tribunals rarely order the revocation or annulment of legislation or administrative actions. Such orders would be difficult to enforce, whereas monetary compensation may be enforced through seizure and sale of state assets.

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20 default 9. Review of investment awards line

Investment awards are usually final, binding, and cannot be appealed. However, there are some limited ways in which an investment award can be reviewed, either by an independent body, a domestic court, or the original Tribunal.

Under the ICSID Convention, an ICSID award may be annulled by an annulment committee appointed by the Chairman of ICSID Administrative Council and not containing any members of the original tribunal. ICSID awards can also be revised in some circumstances if a new, decisive fact is discovered.[tooltip hint="ICSID Convention articles 51 and 52"][*][/tooltip]

Under most other rules (including UNCITRAL), the respondent state cannot have the award annulled, but must argue before local courts that the award should not be enforced, generally on public policy or procedural fairness grounds.[tooltip hint="As provided for in article V of the New York Convention on the Recognition and Enforcement of Arbitral Awards"][*][/tooltip]

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20 default 10. Costs line

Most investment treaties give tribunals the power to decide who should pay the costs of the arbitration. Host states that prevail over investors will therefore usually have some scope to recover their costs from the investor.

There is no clear default rule under ICSID for who should bear costs[tooltip hint="ICSID Convention art 61"][*][/tooltip] – some Tribunals have ruled that the loser should pay costs, others have ordered that each party bears their own, and others have taken into account the conduct of each party. In [Philip Morris v. Uruguay](#), an ICSID arbitration, Philip Morris was ordered to pay all of the costs of the Tribunal and also 70% of Uruguay's costs.[tooltip hint="See Award, paras 582-588"][*][/tooltip]

The default rule in UNCITRAL arbitration is that the loser of the arbitration pays the costs[tooltip hint="UNCITRAL Rules art 42"][*][/tooltip]. However, the Tribunal has the discretion to apportion costs where it would be reasonable to do so. In [Philip Morris v. Australia](#), an UNCITRAL arbitration, Philip Morris was ordered to pay Australia an undisclosed sum for the costs of defending the

dispute. More information is available from our blog post [Philip Morris ordered to pay Australia for costs of defending tobacco plain packaging investment challenge.](#)

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